

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MUSE APARTMENTS, LLC,  
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Plaintiff,  
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v.  
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TRAVELERS CASUALTY AND  
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SURETY COMPANY OF AMERICA,  
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Defendant.  
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Case No. C12-2021RSL

ORDER REGARDING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT  
ON PLAINTIFF'S RECOVERY

This matter comes before the Court on “Defendant’s Motion for Summary Judgment on Plaintiff’s Recovery” (Dkt. # 60). Plaintiff asserts a cause of action for negligence based on the premise that Travelers, through its agent, Bell-Anderson, breached its duty to procure the requested and legally required fidelity bond for 1031 ECI, LLC. Plaintiff seeks to recover damages and attorney’s fees. Travelers seeks summary judgment on plaintiff’s negligence claim on the ground that even if Travelers had issued a \$1 million fidelity bond to 1031 ECI pursuant to RCW 19.310.040(1)(a), the bond would have been exhausted prior to plaintiff’s claim on it. Travelers also asks the Court to reiterate its order dismissing plaintiff’s

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1 contract, bad faith and Consumer Protection Act claims.<sup>1</sup>

2 Taking the evidence presented in the light most favorable to the non-moving party,  
 3 the Court finds as follows:

4 **A. SUMMARY JUDGMENT STANDARD**

5 Summary judgment is appropriate when, viewing the facts in the light most  
 6 favorable to the nonmoving party, there is no genuine dispute as to any material fact that would  
 7 preclude the entry of judgment as a matter of law. L.A. Printex Indus., Inc. v. Aeropostale, Inc.,  
 8 676 F.3d 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case “bears the  
 9 initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v.  
 10 Catrett, 477 U.S. 317, 323 (1986)) and identifying those portions of the materials in the record  
 11 that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the  
 12 moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party  
 13 fails to identify specific factual disputes that must be resolved at trial. Hexcel Corp. v. Ineos  
 14 Polymers, Inc., 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of  
 15 evidence in support of the non-moving party’s position will not preclude summary judgment,  
 16 however, unless a reasonable jury viewing the evidence in the light most favorable to the non-  
 17 moving party could return a verdict in its favor. U.S. v. Arango, 670 F.3d 988, 992 (9th Cir.  
 18 2012).

19 **B. NEGLIGENCE**

20 Plaintiff alleges that Travelers, acting through its agent Bell-Anderson, negligently  
 21 procured a policy that did not provide the coverage required by RCW 19.310.040(1)(a), which  
 22 1031 ECI explicitly requested. Plaintiff further alleges that it suffered damages in the amount it  
 23 would have recovered had the appropriate policy been placed.

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 26 <sup>1</sup> In its “Order Regarding Motions for Summary Judgment” the Court dismissed these claims.  
 Dkt. # 47 at 5.

1                   For purposes of this analysis, the Court will assume that all disputed issues of fact  
 2 will be decided in favor of plaintiff, that Bell-Anderson was Travelers' agent<sup>2</sup> and that Travelers  
 3 knew 1031 ECI wanted to obtain a policy that would satisfy RCW 19.310.040(1)(a) for the  
 4 benefit of 1031 ECI's clients.<sup>3</sup>

5                   Travelers maintains that plaintiff's negligence claim<sup>4</sup> should be dismissed on  
 6 summary judgment, because even if plaintiff could show that Bell-Anderson had a duty to obtain  
 7 a policy covering theft of client funds and that Travelers is liable for damages arising from Bell-  
 8 Anderson's breach of that duty, the resulting policy would have been exhausted by the time  
 9 plaintiff made a claim on it. Travelers contends that three parties asserted losses of over \$1.5  
 10 million, which would have exhausted the \$1 million policy prior to plaintiff filing its claim.

12                   <sup>2</sup> In "Defendant's Motion for Summary Judgment on Plaintiff's Recovery," Travelers does not  
 13 address whether "Bell-Anderson was negligent" or whether "Bell-Anderson was Travelers' agent, such  
 14 that vicarious liability attaches." Dkt. # 60 at 2.

15                   <sup>3</sup> The existence of a third-party beneficiary contract (*i.e.*, one that not only benefits a third-party,  
 16 but also gives rise to a direct obligation from the insurer to the third-party) is generally a matter of  
 17 intent. Lonsdale v. Chesterfield, 99 Wn.2d 353, 361 (1983). Where the policy does not expressly  
 18 identify the third-party as an insured or a payee, the third-party must show more than that the parties had  
 19 a "desire or purpose to benefit a third party"; it must show "an intent to assume a direct obligation to  
 20 that third party." Postlewaite Const., Inc. v. Great Am. Ins. Cos., 106 Wn.2d 96, 100 (1986).  
 21 Construing the assumed policy in light of the circumstances under which it was made, Travelers  
 22 knowingly undertook a direct obligation to 1031 ECI's clients: Travelers knew that 1031 ECI was  
 23 purchasing insurance for the benefit of clients who suffered direct financial loss as a result of the  
 24 exchange facilitator's infidelity and that the policy was required by RCW 19.310.040. Because the  
 25 governing statute expressly provides that "[a] person who claims to have sustained damages by reason  
 26 of the fraudulent act or covered dishonest act of an exchange facilitator or an exchange facilitator's  
 employee may file a claim on the fidelity bond" (RCW 19.310.050(1)), Travelers' "hypothesized" or  
 "assumed" issuance of the statutorily-required policy manifests an intent to assume a direct obligation to  
 the insured's clients as specified in the statute.

24                   <sup>4</sup> Under Loman v. Wilbur, 178 W.2d 165 (2013), plaintiff must prove four element to establish  
 25 negligence: (1) the defendant had a duty or obligation to conform to a certain standard of conduct for the  
 26 protection of others against unreasonable risks; (2) the defendant breached that duty; (3) the breach was  
 a proximate cause of the plaintiff's injury; and (4) the plaintiff suffered a legally compensable injury.

1 Thus, Travelers alleges that plaintiff would not have recovered any of its losses and cannot show  
 2 Travelers caused its injury. However, Travelers did not pay any of the prior claimants under the  
 3 existing facts, nor has it established that it would have paid out the policy limit had the  
 4 hypothesized fidelity bond been in place.<sup>5</sup> Thus, it has not established exhaustion as a matter of  
 5 law. Travelers' motion to dismiss therefore fails since a reasonable jury could conclude that  
 6 Bell-Anderson, acting as Travelers' agent, negligently failed to obtain a policy that provided the  
 7 statutorily-required coverage and that as a result, plaintiff suffered legally compensable  
 8 damages.

9 **C. ATTORNEY'S FEES**

10 Plaintiff claims Travelers has compelled it to initiate litigation to obtain the full  
 11 benefit of the insurance policy and therefore, plaintiff is entitled to attorney's fees. Plaintiff  
 12 argues that pursuant to Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 53  
 13 (1991), "an award of fees is required in any legal action where the insurer compels the insured to  
 14 assume the burden of legal action to obtain the full benefit of his insurance contract . . . ." However,  
 15 Olympic Steamship is a narrow exception to the American rule, which Washington  
 16 typically follows. The American rule holds that the prevailing party can only recover attorney's  
 17 fees if recovery is permitted by contract, statute, or some recognized ground of equity. Leingang  
 18 v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 143, 930 P.2d 288 (1997).

19 Whereas Olympic Steamship involved a question of benefits in an insurance  
 20 contract, in this case, the action arose from a negligence claim. Under Peterson v. Big Bend Ins.  
 21 Agency, Inc., the Court cannot "award attorney's fees in an action involving an insurance

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 23       <sup>5</sup> State and federal law provide that a party facing the potential of multiple liabilities may join as  
 24 adverse parties all persons holding claims and require them to litigate their rights to relief in a single  
 25 action. Wash. CR 22; Fed. R. Civ. P. 22. Travelers does not acknowledge this procedure, much less  
 26 explain why the Court should assume it would not have been used in the hypothetical situation presented  
 for consideration.

1 agent's negligence and an insurer's vicarious liability." 150 Wn.App. 504, 525, 202 P.3d 372  
2 (2009). Thus, while the Court has kept in mind the equitable nature of an award of attorney's  
3 fees under Olympic Steamship and Washington's public policy in favor of compelling insurers  
4 to honor their commitments (McRory v. N. Ins. Co. of N.Y., 138 Wn.2d 550, 560 (1999)), it  
5 finds that the plaintiff is not entitled to attorney's fees and costs.

6 **D. PREVIOUSLY DISMISSED CLAIMS**

7 In "First Amended Complaint for Damages and Declaratory Relief" (Dkt. # 48),  
8 plaintiff includes contract, bad faith and Consumer Protection Act claims. The Court previously  
9 dismissed these claims in "Order Regarding Motions for Summary Judgments" (Dkt. # 47).  
10 Travelers asks the Court to enter an order reiterating the dismissal.

11 Although the Court does not require plaintiff to replead its claims in an amended  
12 complaint, it does not preclude the plaintiff from doing so. See Lacey v. Maricopa County, 693  
13 F.3d 896, 928 (9<sup>th</sup> Cir. 2012) (holding that "[f]or those claims dismissed with prejudice and  
14 without leave to amend, we will not require that they be repled in a subsequent amended  
15 complaint to preserve them for appeal."). The reassertion of the claims does not mean that they  
16 are back in the case. The Court deems an additional order dismissing the plaintiff's dismissed  
17 claims unnecessary.

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19 For all of the foregoing reasons, defendant's "Motion for Summary Judgment on  
20 Plaintiff's Recovery" (Dkt. # 60) is GRANTED in part and DENIED in part. Plaintiff's  
21 attorney's fees claim fails and is hereby DISMISSED. The defendant's motion for summary  
22 judgment on plaintiff's negligence claim and request for the Court to reiterate its dismissal of  
23 dismissed claims are DENIED.

1 Dated this 17th day of June, 2014.

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4 Robert S. Lasnik  
5 United States District Judge  
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